No. 80-135

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RONALD M. STEVENS,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Opinions Below

The New Jersey Supreme Court's order denying petitioner's petition for certification appears in petitioner's Appendix A, at 1a. The opinion of the Superior Court of New Jersey, Appellate Division, not reported, appears in petitioner's Appendix C, at 5a to 12a.

Constitutional Provisions, Statutes and Rules Involved

United States Constitution, Fourth Amendment, see 1a, *infra.*

United States Constitution, Sixth Amendment, see 2a, *infra.*

United States Constitution, Fourteenth Amendment, see 3a, *infra.*

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N.J.S.A. 24:21-20(a)(4), see 5a, *infra.*

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N.J.Ct.R. 2:12-4, see 7a, *infra.*

N.J.Ct.R. 3:5-7(d), see 8a, *infra.*

Statement of the Case

Procedural History

On March 13, 1978 Burlington County Indictment No. I-531-77 was filed. That indictment charged petitioner with possession of a controlled dangerous substance with intent to distribute in violation of N.J.S.A. 24:21-19(a)(1) (count one) and possession of marijuana in excess of 25 grams in violation of N.J.S.A. 24:21-20(a)(4) (count two). (Ra 4, 5).

On June 30, 1978 petitioner filed a motion to suppress evidence seized as the result of an allegedly illegal search. The motion was argued on November 3, 1978 before the Honorable Paul R. Kramer, J.C.C., of the Law Division of the Burlington County Court. Judge Kramer denied petitioner's motion. On November 3, 1978 petitioner entered a *retraxit* plea of guilty to count one (possession of a controlled dangerous substance with intent to distribute) before the Honorable Victor Friedman, J.J.D.R.C., in the Superior Court of New Jersey, Law Division. In return for the plea, respondent agreed to recommend dismissal of

count two (possession). In addition, respondent agreed to recommend that any custodial sentence be served in the Burlington County Jail. Respondent further agreed that it would not object to petitioner being placed in a jail work release program or to a continuance of bail pending appeal. On February 23, 1979 Judge Kramer sentenced petitioner on count one (possession with intent to distribute) to the Burlington County Jail for a term of 364 days. A fine of $500.00 was also imposed. Judge Kramer dismissed count two (possession of marijuana) of the indictment, credited defendant with three days time served and stayed the execution of sentence pending appeal.

Final judgment was entered on February 23, 1979. Notice of Appeal to the Appellate Division of the Superior Court of New Jersey was filed by petitioner on April 10, 1979. The case was argued before that court on February 11, 1980. On March 12, 1980, in an unpublished opinion, the Appellate Division rejected petitioner's arguments and affirmed his conviction. (Pa 5 to 12).[1] A petition for certification to the Appellate Division was filed by petitioner on March 27, 1980 with the Supreme Court of New Jersey. That petition for discretionary review was denied on May 28, 1980. On July 28, 1980 petitioner filed with this Court a petition for a writ of *certiorari*.

Factual Background

The facts giving rise to the instant litigation were adduced at the suppression and plea hearings below.[2] On

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[1] "Pa" refers to Petitioner's Appendices.

"Ra" refers to Respondent's Appendix.

[2] This factual statement is drawn from the testimony adduced at the suppression hearing, from petitioner and the arresting officer, as well as statements made by petitioner at the time of entry of his guilty plea.

December 21, 1977, at approximately 7:00 p.m., petitioner was travelling north bound on the New Jersey Turnpike. He was driving a Pontiac sedan with Florida license plates. This vehicle was rented from Avis Rent-A-Car in Florida. Petitioner was enroute from Florida. The purpose of petitioner's trip was to transport 269 pounds of marijuana to an undetermined destination. Petitioner was driving continuously for three days since leaving Florida. He stopped only for occasional meals and rest. State Trooper William Stolinski of the New Jersey State Police, on routine patrol, approached petitioner's automobile from behind at approximately 7:12 p.m. Stolinski observed petitioner's vehicle weaving on the roadway. He followed petitioner for approximately one mile to determine whether the vehicle should be stopped. The vehicle continued in an erratic path and Stolinski decided to stop petitioner. Stolinski signaled for petitioner to stop the vehicle. Stolinski approached the vehicle and requested that petitioner produce his driver's license and a registration for the vehicle. Stolinski advised petitioner of the traffic infraction for which he was stopped. After examining petitioner's credentials, Stolinski questioned petitioner about his erratic driving behavior.

In an effort to ascertain whether petitioner's weaving was the simple result of fatigue or caused by the influence of alcohol or other drugs, Stolinski requested that petitioner exit the vehicle. When petitioner opened the door of the vehicle to exit, Stolinski detected a strong vegetative odor emanating from within the vehicle. Stolinski's extensive experience and training caused him to suspect that the vegetative odor was marijuana. Being virtually certain that petitioner's automobile contained contraband, Stolinski instructed petitioner to follow him (Stolinski) to the Moorestown Barracks of the New Jersey State Police. Stolinski patted down petitioner and then searched the area of the

automobile around the driver's seat for weapons. Stolinski did not conduct a thorough search of the vehicle at this time. The officer's primary concern at this point was for his own personal safety. The officer's purpose in bringing petitioner to the Moorestown Barracks was to immobilize the vehicle pending an application for a search warrant for petitioner's vehicle.

When petitioner and Stolinski arrived at the Moorestown Barracks, petitioner was taken inside the station. Stolinski prepared the necessary papers and drafted the accompanying affidavit necessary for procurement of the search warrant. This process took approximately two hours. The application for the search warrant was presented to the Honorable Alexander Wood, J.S.C., of the Superior Court of New Jersey, Law Division. In the affidavit, Stolinski swore that he detected a strong odor of marijuana emanating from within petitioner's vehicle. The affidavit further stated that Detective Andre Cavaliere also "detected the odor of marijuana coming from within the interior of the car," while the vehicle was parked at the Moorestown Barracks. Judge Wood issued the search warrant at 10:15 p.m. When Stolinski presented the search warrant to petitioner, petitioner produced the key to the trunk of the vehicle. A search of the trunk produced 269 pounds of marijuana wrapped in eight green plastic bags. He was subsequently placed under arrest. Petitioner was additionally issued a summons for driving his vehicle in an erratic manner on the highway.

On November 3, 1978 petitioner entered a bargained-for *retraxit* plea of guilty to possession of marijuana with the intent to distribute. (Count One).

REASONS FOR DENYING CERTIORARI

POINT I

The Sixth and Fourteenth Amendments do not give rise to a claim of ineffective assistance of counsel merely because a state court has ruled against petitioner's counsel at trial.

Petitioner contends that the denial by the New Jersey courts of his right to present a valid constitutional issue in his defense raises significant issues in connection with the Sixth and Fourteenth Amendments and the administration of federal *habeas corpus* relief which should be resolved by this Court. The State submits that the instant claim by petitioner is procedurally barred because it was not raised below. However, the State will additionally address the merits of petitioner's claim in order that its insubstantiality is demonstrated to this Court.

A. Petitioner's claim is procedurally barred.

At no time in his arguments before either the Superior Court of New Jersey, Appellate Division, or the Superior Court of New Jersey, Law Division, did petitioner assert that he was denied the effective assistance of counsel. This claim was raised for the first time by petitioner when he sought discretionary appellate review from the Supreme Court of New Jersey pursuant to N.J.Ct.R. 2:12-4. (Ra 7). That review was denied. Under New Jersey law, the Supreme Court of New Jersey will not consider arguments which have not been raised below in accord with applicable court rules. See, *e.g., Farley* v. *$168,400.97,* 55 N.J. 31, 46, 259 A.2d 201, 209 (1969). It is well established that this Court will not entertain a federal constitutional issue

raised before it for the first time on review of a state court decision. *Estate of Wilson* v. *Aiken Industries, Inc.*, 439 U.S. 877, 879 (1978) (Blackmun, J., concurring); *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 283 (1978); *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969). The New Jersey State courts were never accorded an opportunity to address this issue below. Accordingly, the instant claim of petitioner is not properly before this Court and should not be addressed by it. *Id.*

B. Even if the instant claim is not procedurally barred, the extant facts do not support a claim of ineffective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution.

Petitioner contends that the State courts, by precluding him, at the suppression proceeding, from raising and pursuing a facially invalid claim, denied him the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Respondent submits that petitioner misperceives the nature of the action taken by the New Jersey State courts in the instant matter.

At the time of the suppression hearing in the instant matter, petitioner, through his counsel, alleged that he was subjected to an unlawful search and seizure in violation of the Fourth Amendment. Specifically, petitioner sought to raise the legality of the allegedly random stop of his vehicle by Trooper Stolinski. The State court properly forbade petitioner to pursue that line of inquiry because it was irrelevant. New Jersey law at that time permitted random stops of motor vehicles for a credentials check. Petitioner's motion to suppress evidence was subsequently denied and petitioner entered a plea of guilty to possession of marijuana with intent to distribute as the result of plea negotiations with the State, specifically reserving

his right to raise the issue of the random stop on appeal. N.J.Ct.R. 3:5-7(d). (Ra 8).

On appeal, petitioner raised the issue of random motor vehicle stops and urged the applicability of the recent decision of this Court in *Delaware* v. *Prouse,* 440 U.S. 648 (1979). The Appellate Division, in rejecting petitioner's arguments and affirming his conviction, expressly set forth the reasons why *Delaware* v. *Prouse, supra,* would be accorded only prospective application in New Jersey. (Pa 5 to 12). The Supreme Court of New Jersey declined to grant discretionary review of that decision. (Pa 1).

Petitioner now asserts that the courts below failed to fully and fairly consider petitioner's Fourth Amendment claims. The record, however, does not support such an allegation. Petitioner was not precluded, in any of the proceedings below, from presenting his arguments on the legality of random stops. At the suppression hearing, the court properly stated the law as it then existed in New Jersey: that police were empowered to stop a motor vehicle entirely at random in order to demand the production, and assess the validity, of the driver's credentials. See *State* v. *Gray,* 59 N.J. 563, 567, 285 A.2d 1, 3 (1971); *State* v. *Marchitto,* 132 N.J. Super. 511, 514, 334 A.2d 354, 355 (App. Div. 1974), certif. den. 68 N.J. 163, 343 A.2d 451 (1975); *State* v. *Braxton,* 111 N.J. Super. 191, 196, 268 A.2d 40, 42 (App. Div. 1970), rev. o.g. 57 N.J. 286, 271 A.2d 713 (1979); *State* v. *Kabayama,* 98 N.J. Super. 85, 88, 236 A.2d 164, 167 (App. Div. 1967), aff'd o.b. 52 N.J. 507, 246 A.2d 714 (1968); N.J.S.A. 39:3-29. (Ra 6). Moreover, petitioner's suppression hearing was conducted pursuant to the guidelines established by this Court in *Franks* v. *Delaware,* 438 U.S. 154 (1978).[3] Under those guidelines,

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[3] The State is constrained to note that petitioner was not entitled to a *Franks* v. *Delaware* hearing below. The New Jersey Supreme Court in *State* v. *Howery,* 80 N.J. 563, 404 A.2d 632 (Sup. Ct. 1979), accorded prospective application only to the principles enunciated in *Franks* v. *Delaware,* 438 U.S. 154 (1978). This Court has not yet passed on that issue. *Cf. United States* v. *Peltier,* 422 U.S. 531 (1975).

the court below properly excluded testimony as to why defendant was initially stopped as irrelevant under the limited review of a *Franks* v. *Delaware* hearing. *Id.* Petitioner pleaded guilty and a final judgment of conviction was entered against him prior to this Court's decision in *Delaware* v. *Prouse, supra.*

In the Appellate Division, petitioner again raised the issue of the random stop. This time, however, petitioner relied upon the holding of this Court in *Delaware* v. *Prouse, supra,* which was decided during the pendency of petitioner's appeal. The Appellate Division rejected petitioner's argument. It held that in light of the New Jersey Supreme Court's holding in *State* v. *Howery, supra, Delaware* v. *Prouse, supra,* would, likewise, be accorded prospective application only.

Petitioner, thereafter, petitioned the New Jersey Supreme Court for certification to the Appellate Division on the issue of the retroactivity of *Delaware* v. *Prouse, supra.* The New Jersey Supreme Court declined discretionary review of petitioner's petition. Shortly before denying petitioner's request for discretionary review, the New Jersey Supreme Court ruled in another case, *State* v. *Carpentieri,* 82 N.J. 546, 414 A.2d 966 (1980), that *Delaware* v. *Prouse, supra* was not retroactive. *State* v. *Carpentieri, supra,* 414 A.2d at 967.

Clearly, the factual situation in the instant case does not support petitioner's argument that the New Jersey courts failed to fully and fairly consider petitioner's Fourth Amendment claims. To the contrary, in each instance petitioner's claims were rejected, not suppressed, through the application of applicable State law principles and of federal precedent. Merely because New Jersey, in compliance with federal retroactivity doctrine has determined to accord prospective application only to the principles

announced in *Prouse* does not give rise to a claim of ineffective assistance of counsel because petitioner is adversely affected by that decision. Surely, that is not what this Court envisioned when it determined what standards to apply in resolving the question of effective assistance of counsel. *See Faretta* v. *California,* 422 U.S. 806, 818 (1975); *Gideon* v. *Wainwright,* 372 U.S. 335 (1963).

Respondent submits that petitioner's claim is utterly devoid of merit. It does not supply any support for the grant of a writ of *certiorari* in this matter.[4]

POINT II

The retroactivity of *Delaware* v. *Prouse* is not factually implicated in this case.

The instant case is a factually inappropriate vehicle for determining the retroactivity of *Delaware* v. *Prouse, supra.* That case involved the legality of *random* motor vehicle stops. The evidence presented below in this matter indicates that the stop of the vehicle driven by petitioner was *not* random. The stop took place because the arresting officer observed that vehicle "weaving" on the highway and determined that it was necessary to establish the cause for this erratic driving behavior, which violated New Jersey's motor vehicle code. It was in the course of investigating this motor vehicle violation that the arresting officer discovered the odor of marijuana and ascertained the source of that odor. The motor vehicle stop was not in

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[4] Because of respondent's posture on this issue, a discussion of the policies set forth in *Stone* v. *Powell,* 428 U.S. 465 (1976), relative to Fourth Amendment issues in connection with the administration of federal *habeas corpus* relief, is unnecessary.

any way a sham. A motor vehicle summons was issued to petitioner because of the erratic driving behavior he exhibited.

This Court should avoid unnecessary constitutional decision-making unless compelled to do so by the record in a given matter. *Cf. Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 324-25 (1936). The factual record in this matter does not require a determination of the retroactivity of *Delaware* v. *Prouse, supra.*

POINT III

The principles announced in *Delaware* v. *Prouse* have been properly applied in New Jersey: those principles should be accorded prospective application only.

Petitioner contends that the decision in *Prouse* should be accorded retroactive application by this Court. Until now, this decision was left to the individual states, under applicable federal precedent by this Court. New Jersey decided as a matter of its own law, and of federal law, to accord prospective application only to the principles announced in *Prouse. State* v. *Carpentieri, supra.* The analysis in *Carpentieri* mirrors the reasoning of this Court in its most recent decision in the area of retroactivity. *Brown* v. *Louisiana,* —— U.S. ——, 100 S.Ct. 2214 (1980). The New Jersey Supreme Court applied the same standards for determining the issue of retroactivity as pronounced by this Court in previous decisions and upheld in *Brown* v. *Louisiana, supra,* 100 S.Ct. at 2219-20. The decision to accord the holding in *Prouse* prospective application only was reached after employing the three-pronged test set forth in *Stoval* v. *Denno,* 388 U.S. 293, 297 (1967). Accordingly, petitioner's petition for a writ of *certiorari* should be denied.

At the outset, it should be emphasized that prior to the decision in *Delaware* v. *Prouse, supra,* there was no requirement in New Jersey that an officer have probable cause or any articulable reason to stop a vehicle. The officer was empowered by statute to make a random stop of any vehicle to ensure that the driver was properly licensed and the vehicle legitimately registered. *State* v. *Gray, supra;* see N.J.S.A. 39:3-29. (Ra 6). Accordingly, in cases where a vehicle was stopped, there was no need at trial to generate detailed facts concerning the reasons for the stop. The instant matter arose before this Court's decision in *Delaware* v. *Prouse, supra,* and the ratiocination for the stop was, therefore, not of critical importance in the context of analyzing the constitutionality of the search. Nonetheless, facts relative to this issue were adduced below although not highlighted.

Subsequent to petitioner's conviction becoming final, this Court decided *Delaware* v. *Prouse, supra.* In that case, this Court reviewed the constitutionality of a warrantless seizure of marijuana detected in plain view by a Delaware highway patrol officer who stopped the *Prouse* automobile totally at random in order to conduct a motor vehicle credentials check. In evaluating this "routine procedure," this Court agreed that:

> the States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration and inspection requirements are being observed. [99 S.Ct. at 1398.]

This Court, however, considered the "discretionary stop check an [in]sufficiently productive mechanism to justify

the intrusion upon Fourth Amendment interests which such stops entail." *Delaware* v. *Prouse, supra,* 99 S.Ct. at 1399. Accordingly, it concluded that:

> Except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, the stopping of an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment. [99 S.Ct. at 1401.]

Petitioner presented the issue of retroactivity in light of *Delaware* v. *Prouse, supra,* in his appeal to the Appellate Division. The New Jersey Supreme Court had recently analyzed the issue regarding the retroactivity of decisions relating to the exclusionary rule. *State* v. *Howery,* 80 N.J. 563, 404 A.2d 632 (1979). In *Howery,* the defendant argued that the holding of this Court in *Franks* v. *Delaware, supra,* which established the right of a defendant to challenge the validity of a facially sufficient search warrant on the ground that it contains false information, should be applied retroactively as a matter of both federal and New Jersey law. In holding that *Franks* should be applied prospectively only, the *Howery* court iterated the sound reasoning of both this Court and its own prior decisions relative to the applicability of a new rule of law. *State* v. *Howery, supra,* 80 N.J. at 568-571, 404 A.2d at 635-36. The New Jersey Supreme Court emphasized that each competing consideration must be "weighed by examining 1) the purpose of the rule and whether it would be furthered by a retroactive application, 2) the degree of reliance placed on the old rule by those who administered it, and 3) the effect a retroactive

application would have on the administration of justice." *Id.; State* v. *Nash,* 64 N.J. 464, 469-70, 317 A.2d 689, 692 (1974). The court found "persuasive" the reasoning in *United States* v. *Peltier,* 422 U.S. 531 (1975), that "in every case in which the Court has addressed the retroactivity problem in the context of the exclusionary rule . . . [it] concluded that any such new constitutional principle would be accorded *only* prospective application." *United States* v. *Peltier, supra* at 535. (emphasis added).

The defendant in *Howery* attempted to "try the search warrant" at his trial. The trial court relied on *State* v. *Petillo,* 61 N.J. 165, 293 A.2d 649 (1972), *cert.* den. 410 U.S. 945 (1973), in denying that request. *State* v. *Howery, supra,* 80 N.J. at 570, 404 A.2d at 636. On review of the trial court's ruling, the New Jersey Supreme Court held:

> Unquestionably this ruling was correct under the law applicable at the time the suppression hearing was held; hence, even if it be assumed that the warrant contains perjurious statements, the conviction of the defendant was obtained *in good faith reliance on 'then-prevailing constitutional norms.'* [*State* v. *Howery, supra,* 80 N.J. at 570, 404 A.2d at 636 (emphasis added).][5]

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[5] The decision in *State* v. *Petillo,* 61 N.J. 165, 293 A.2d 649 (1972), *cert.* den. 410 U.S. 945 (1973), was decided on grounds which were consistent with the majority of State and lower federal courts prior to this Court's ruling in *Franks* v. *Delaware, supra. State* v. *Petillo, supra,* 61 N.J. at 175-77, 293 A.2d at 654-55. The *Howery* court noted that subsequent to the decision in *Franks,* the California Supreme Court went beyond the requirements of that decision by interpreting the California constitution. It held that a warrant is invalid when a supporting affidavit is found to contain *any* deliberate untruth, regardless of whether that mis-

(Footnote continued on following page)

Clearly, the analysis in *State* v. *Howery, supra,* comports with the most recent decision of this Court in the retroactivity area. *Brown* v. *Louisiana, supra.* Subsequent to the decision in *Howery,* the New Jersey Supreme Court again addressed the issue of retroactivity of decisions in the area of the exclusionary rule. In *State* v. *Carpentieri, supra,* the court affirmed the principles stated in *State* v. *Howery, supra. State* v. *Carpentieri, supra,* 82 N.J. at 549, 414 A.2d at 967.

In that case, the defendant was convicted of possession of marijuana in violation of N.J.S.A. 24:21-20 (a) (4) (Ra 5), and possession with intent to distribute in violation of N.J.S.A. 24:21-19(a)(1) (Ra 4). On appeal, the Appellate Division of the New Jersey Superior Court viewed the issue as whether "the trial judge erred in denying defendant's motion to suppress evidence seized in a car driven by defendant after it was stopped for a routine 'license and registration check.'" *State* v. *Carpentieri,* 168 N.J. Super. 589, 591, 403 A.2d 963, 965 (App. Div. 1979). In reversing the conviction, the Appellate Division retroactively applied *Delaware* v. *Prouse, supra.* The New Jersey Supreme Court reversed that decision. *State* v. *Carpentieri, supra,* 82 N.J. at 556, 414 A.2d at 971.

The New Jersey Supreme Court in *State* v. *Carpentieri* noted that neither the defendant nor the dissent challenged the controlling effect of *State* v. *Howery, supra,*

(Footnote continued from preceding page)

statement is material or not. *State* v. *Howery, supra,* 80 N.J. at 568, 404 A.2d at 635. The New Jersey Supreme Court declined to follow the California approach, holding that in entertaining veracity challenges New Jersey courts need go no further than is required "as a matter of Federal Constitutional law in *Franks* v. *Delaware, supra.*" *State* v. *Howery, supra,* 80 N.J. at 568, 404 A.2d at 635.

in New Jersey. Rather, the issue concerned the soundness of that decision. *State* v. *Carpentieri, supra,* 82 N.J. at 549, 414 A.2d at 967. Being satisfied that *Howery* was properly decided, it "[affirmed] the principles stated therein." *State* v. *Carpentieri, supra,* 82 N.J. at 549, 414 A.2d at 967. In so doing, the New Jersey Supreme Court went on to analyze this Court's one sentence order in *Kretchmar* v. *Nebraska,* 440 U.S. 978 (1979), which followed the *Delaware* v. *Prouse, supra,* decision by one week. In that order, this Court vacated the conviction of Kretchmar and remanded the case "to the Supreme Court of Nebraska for further consideration in light of [*Prouse*]." *Kretchmar* v. *Nebraska, supra.* On remand, the Nebraska Supreme Court summarily reversed Kretchmar's convictions and ordered the dismissal of all charges preferred against him. *Nebraka* v. *Kretchmar,* 203 Neb. 663, 280 N.W.2d 46 (Neb. Sup. Ct. 1979) (Kretchmar II).

The New Jersey Supreme Court, in reviewing the action taken by the Nebraska Supreme Court, disagreed with that action. It concluded that this Court's order "was simply calling upon the Nebraska Supreme Court itself to resolve the issue of *Prouse's* retroactivity, that question obviously not having been encompassed by Kretchmar's petition." *State* v. *Carpentieri, supra,* 82 N.J. at 554, 414 A.2d at 971. The New Jersey Supreme Court reviewed a similar summary order issued by this Court in *Bowen* v. *United States,* 422 U.S. 916 (1975), in light of its decision in *Almeida-Sanchez* v. *United States,* 413 U.S. 266 (1973), to conclude that "summary orders by the Supreme Court directing remand for reconsideration in light of new exclusionary rule decisions do not intimate the Court's view on the retroactivity of such new decisions." *State* v. *Carpentieri, supra,* 82 N.J. at 555, 414 A.2d at 971.

The decisions of the New Jersey Supreme Court in *Carpentieri* and *Howery* are premised upon careful analysis

of applicable State and federal law. In reaching the decision to accord *Prouse* prospective application only, the court has dutifully adhered to the criteria set forth by this Court in determining the issue of retroactivity of new exclusionary rule decisions. *State* v. *Carpentieri, supra,* 82 N.J. at 549-551, 414 A.2d at 967-969; *State* v. *Howery, supra,* 80 N.J. at 568-571, 404 A.2d at 635-636.

Moreover, the methodology employed by the New Jersey Supreme Court utilized the rationale most recently embraced by this Court in *Brown* v. *Louisiana, supra.* Clearly, this fact dissipates petitioner's contention that "the New Jersey decisions, ignoring this Court's development of the law, cited only pre-*Almeida* New Jersey authority." (Pb at 11). The criteria utilized by the New Jersey Supreme Court was reaffirmed by this Court as the proper methodology to utilize in resolving questions of retroactivity. *Brown* v. *Louisiana, supra,* —— U.S. at ——, 100 S.Ct. at 2219. In *Brown* v. *Louisiana, supra,* this Court stated:

> [T]he test consistently employed by the Court to decide whether a new constitutional doctrine should be applied retroactively contemplates the consideration of three criteria: '(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards'.
>
> Moreover, our decisions establish that '[f]oremost among these factors is the purpose to be served by the new constitutional rule' . . . 'Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so

> raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.' [*Brown* v. *Louisiana, supra,* —— U.S. at ——, 100 S.Ct. at 2219-20 (citations omitted).]

The holding in *Delaware* v. *Prouse, supra,* which invalidates random motor vehicle stops for credentials checks, does not "overcome an aspect of the criminal trial that substantially impairs its truth-finding function." *Brown* v. *Louisiana, supra,* —— U.S. at ——, 100 S.Ct. at 2219-20. *Delaware* v. *Prouse, supra,* addresses itself to the exclusionary rule, not to the guilt determining process. The second and third criteria for determining retroactivity must be examined.

In this matter, the intrusion into petitioner's privacy interests emanating from the detention of his motor vehicle is a *fait accompli.* The deterrent thrust of the exclusionary rule can in no way be advanced by the invalidation of police action which took place in December 1977 through the invocation of constitutional rights unrecognized before March 1979. Deterrence is the primary purpose of the exclusionary rule, *Stone* v. *Powell,* 428 U.S. 465, 485 (1976), and the deterrent purposes of the exclusionary rule are not served by retroactive application. *United States* v. *Peltier,* 422 U.S. 531, 538-39 (1975).

Equally important to proper resolution of the instant controversy is an appreciation for the justifiable reliance that State law enforcement officials reposed upon New Jersey's prior standards. N.J.S.A. 39:3-29 (Ra 6) requires

every motorist to keep his driver's license, vehicle registration and insurance identification card in his possession while driving on the public highways of New Jersey. As previously noted, the New Jersey judiciary repeatedly held that the police were empowered to stop motor vehicles entirely at random in order to demand the production and assess the validity of these driving credentials.

That the random stop procedure authorized by the New Jersey State courts has been deemed violative of the Fourth Amendment does not mandate suppression of the evidence seized from this petitioner. See *State* v. *Carpentieri, supra; State* v. *Howery, supra.* In view of the position on this issue adopted by the New Jersey Supreme Court in *Carpentieri* and *Howery,* respondent respectfully submits that the principles enunciated in *Delaware* v. *Prouse, supra,* should only be applied to those motor vehicle stops which post-date that decision, *i.e.,* March 27, 1979. Since the stop here under review occurred over two years before that date, it seems manifest that petitioner may not fairly invoke the *Prouse* decision as a basis for suppression of the evidence seized in this case.

This Court's position on retroactivity in the context of the exclusionary rule is unmistakable. As the New Jersey Supreme Court noted in *State* v. *Carpentieri, supra,* Justice Rehnquist outlined the development[6] of that position in *United States* v. *Peltier, supra,* as follows.

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[6] See, *e.g., Desist* v. *United States,* 394 U.S. 244 (1969) (holding that the invalidation of certain wiretapping procedures effected by *Katz* v. *United States,* 389 U.S. 347 (1967), was not to be applied retroactively); *Fuller* v. *Alaska,* 393 U.S. 80 (1968) (holding that the ban on the admission of evidence seized in violation of the Federal Communications Act as construed in *Lee* v. *Florida,* 393 U.S. 378 (1968), was to have exclusively prospective effect); *Williams* v. *United States,* 401 U.S. 646 (1971) (holding nonretroactive the decision in *Chimel* v. *California,* 395 U.S. 752 (1969), which narrowed the scope of the area subject to warrantless search incident to arrest).

> Since 1965 this Court has repeatedly struggled with the question of whether rulings in criminal cases should be given retroactive effect. In those cases '[w]here the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials,' *Williams* v. *United States,* 401 U.S. 646, 653, 28 L.Ed.2d 388, 91 S.Ct. 1148 (1971), the doctrine has quite often been applied retroactively. *It is indisputable, however, that in every case in which the Court has addressed the retroactivity problem in the context of the exclusionary rule, whereby concededly relevant evidence is excluded in order to enforce a constitutional guarantee that does not relate to the integrity of the factfinding process, the Court has concluded that any such new constitutional principle would be accorded only prospective application.* [422 U.S. at 535-36 (emphasis supplied).]

In the face of this definitive statement, petitioner attempts to argue that the Appellate Division of the Superior Court of New Jersey utilized "stale New Jersey precedent" and based its decision on "an irrelevant 'retroactivity' analysis." (Pb at 19). However, case law at both the State and federal levels supports the decision of the Appellate Division in this matter. *Brown* v. *Louisiana, supra; State* v. *Carpentieri, supra.*

Literally thousands of criminal cases in New Jersey, particularly those involving the illegal possession of firearms and the distribution of large quantities of narcotics, have been prosecuted with evidence derived from random motor vehicle credentials checks that took place prior to the decision in *Delaware* v. *Prouse, supra.* Many of those

cases were pending when *Delaware* v. *Prouse, supra* was decided. Hundreds of those cases are pending even today. The good faith reliance of the law enforcement officials of New Jersey on a statutory mandate (previously upheld against constitutional challenge by the Supreme Court of New Jersey) in making random motor vehicle credentials checks cannot be faulted. No prior decision of this Court ever addressed the issue and in fact, this Court expressly declined to determine the question.[7] Retroactive application of *Delaware* v. *Prouse, supra* cannot be justified.

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[7] In ruling on the legality of roving border stops by immigration and naturalization officials in *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 883 n.8 (1975), this Court stated:

> Our decision in this case takes into account the special function of the Border Patrol, the importance of the governmental interests in policing the border area, the character of roving-patrol stops and the availability of alternatives to random stops unsupported by reasonable suspicion. Border Patrol agents have no part in enforcing laws that regulate highway use, and their activities have nothing to do with an inquiry whether motorists and their vehicles are entitled, by virtue of compliance with laws governing highway usage, to be upon the public highways. Our decision thus does not imply that state and local enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding drivers' licenses, vehicle registration, truck weights, and similar matters.

CONCLUSION

For the reasons set forth herein, it is respectfully urged that the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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APPENDIX

United States Constitution

Fourth Amendment—Searches and Seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution

Sixth Amendment—Right to Counsel (In Relevant Part)

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

United States Constitution

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

N.J.S.A. 24:21-19(a)(1)

Prohibited acts A.—Manufacturing, distributing, or dispensing—Penalties

a. Except as authorized by this act, it shall be unlawful for any person knowingly or intentionally:

> (1) To manufacture, distribute, or dispense, or to possess or have under his control with intent to manufacture, distribute, or dispense, a controlled dangerous substance . . .

N.J.S.A. 24:21-20(a)(4)

Prohibited acts B.—Possession, use or being under influence—Penalties

a. It is unlawful for any person, knowingly or intentionally, to obtain, or to possess, actually or constructively, a controlled dangerous substance unless such substance was obtained directly, or pursuant to a valid prescription or order from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this act. Any person who violates this section with respect to:

* * *

4. Possession of more than 25 grams of marihuana, including any adulterants or dilutants, or more than 5 grams of hashish is guilty of a high misdemeanor and shall be punished by imprisonment for not more than 5 years, a fine of not more than $15,000.00, or both; provided however, that any person who violates this section with respect to 25 grams or less of marihuana, including any adulterants or dilutants, or 5 grams or less of hashish is a disorderly person . . .

N.J.S.A. 39:3-29

License, registration certificate and insurance identification card; possession; exhibit upon request; violations, fine

The driver's license, the registration certificate of a motor vehicle and an insurance identification card shall be in the possession of the driver or operator at all times when he is in charge of a motor vehicle on the highways of this State.

The driver or operator shall exhibit his driver's license, and an insurance identification card, and the holder of a registration certificate or the operator or driver of a motor vehicle for which a registration certification has been issued, whether or not the holder, driver or operator is a resident of this State, shall also exhibit the registration certificate, when requested so to do by any motor vehicle inspector, police officer or magistrate, while in the performance of the duties of his office and shall write his name in the presence of the officer, so that the officer may thereby determine the identity of the licensee and at the same time determine the correctness of the registration certificate, as it relates to the registration number and number plates of the motor vehicle for which it was issued; and the correctness of the evidence of a policy of insurance, as it relates to the coverage of the motor vehicle for which it was issued.

Any person violating this section shall be subject to a fine not exceeding $100.00.

New Jersey Court Rule 2:12-4

Grounds for Certification

Certification will be granted only if the appeal presents a question of general public importance which has not been but should be settled by the Supreme Court or is similar to a question presented on another appeal to the Supreme Court; if the decision under review is in conflict with any other decision of the same or a higher court or calls for an exercise of the Supreme Court's supervision and in other matters if the interest of justice requires. Certification will not be allowed on final judgments of the Appellate Division except for special reasons.

New Jersey Court Rule 3:5-7(d)

Motion to Supress Evidence and for Return of Property

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(d) Appellate Review. Denial of a motion made pursuant to this rule may be reviewed on appeal from a judgment of conviction notwithstanding that such judgment is entered following a plea of guilty.